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IN THE

Supreme Court of the United States

October Term, 1961

NO. 791

JOHN CADEZ, JR. and JAMES CADEZ, a partnership,
doing business as
CENTRAL DISTRIBUTING COMPANY,
PETITIONERS,

vs.

GENERAL CASUALTY COMPANY OF AMERICA
and
GENERAL INSURANCE COMPANY OF AMERICA,
RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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OPINION BELOW

Since the filing of the Petition for a Writ of Certiorari on March 12, 1962, the opinion of the Court of Appeals for the Tenth Circuit in this case has been printed. The decision is reported in 298 Federal Reporter (Second Series) at page 535.

QUESTIONS PRESENTED FOR REVIEW

The three questions presented to this Court for review by the petitioners are carefully phrased to impute doctrines to the Courts below which were not advocated by those Courts.

It is the respondent's position that certiorari should be denied because the questions presented for review do not accurately follow from the evidence adduced at the trial, nor do they accurately follow from the law as expressed in the opinions of the lower courts.

Specifically, referring to each of the three grounds raised by the petition separately:

1) Neither the District Court nor the Court of Appeals imported a contract doctrine to thwart a tort action. In essence, both courts applied an agency doctrine to determine the liability of the insurance company principal for negligent mis-representations of its local or soliciting agent.

2) Neither the District Court nor the Court of Appeals abrogated any duty voluntarily undertaken by the insurance companies, since the insurance companies never voluntarily undertook any such duties as set forth. On pages 2,3 of the Petition "a factual synopsis" is set forth by the petitioners which asserts such a voluntary assumption of duties by the insurance companies. Such "synopsis," however, is not "factual," and it bears no relationship to the evidence presented in the trial court.

3) Neither the District Court nor the Court of Appeals attempted to grant immunity to insurance companies for the torts of their agents, in violation of the Colorado Constitution. The decision of the courts below was simply based on the proposition that under the facts of this case the insurance company principal was not liable for the negligent mis-representation of its local, soliciting agent.

STATEMENT OF THE CASE

Although the respondents agree that there is no serious factual dispute in the record, respondents feel that it is necessary to set forth a concise statement of the material facts because petitioners' statement is incorrect in that testimony is taken out of context to imply a duty not supported by the evidence.

Chronologically, the facts as proved most favorably to the petitioners are summarized below.

The petitioners, John Cudez, Jr. and James [illegible] were doing business as Central Distributing Company, and the sons and successors of John Cudez, Sr. who formerly did business as Central Distributing Company. (R. 19). The Cudez's live in Grand Junction, Colorado. (R. 19).

When John Cudez, Sr. began operating the Central Distributing Company on October 31st, 1949, he went to the respondents, (R. 19), and requested that his business be carefully covered. (quotation R. 19, 1st). Mr. [illegible] died in 1955 and no testimony was available from him at the trial (R. 23). At that time, John Cudez, Sr. did not ask for any specific type of coverage, but relied on Mr. [illegible]. Mr. Cudez did not know what insurance companies Mr. [illegible] represented. (R. 18). Mr. Cudez did not ask for any specific insurance company to carry any part of the risk, but relied on Mr. [illegible]'s judgment. (R. 18). In all matters in regard to the insurance, Mr. Cudez relied on Mr. [illegible].

Mr. [illegible] was a "multiple line" insurance agent for the respondents, as distinguished from "casualty" agent. (R. 23). (Petitioners' Exhibit E. 13). He was originally authorized to take an application for insurance and forward it to the Denver Service Office of the respondents for approval. (R. 23). The Denver office actually issued the policy. (R. 23). Mr. [illegible], local agent, could not issue a policy for insurance. (R. 23).

In making out the application, the local agent collects facts (R. 23, 31) and sets out on the application what

coverage is desired (R. 23). The agent's job is to be sure that the insured is properly covered (R. 29-32). The underwriting office to which the application is sent determines from the facts listed what rate to charge and what risks the insurance companies want to cover (R. 29).

In November 1949, Mr. Lawson, the respondents' special agent, helped fill out the application for the blanket liability policy. At that time Cadez said there were no employees and employer's liability was not discussed (R. 35).

The field man for the insurance company introduces new coverages to the agent (R. 31) but he has no underwriting authority (R. 31). The field man does not have a direct relationship to the insured, but only aids the agent (R. 31-2).

In November 1949, when the first policy was delivered, the Central Distributing Company did not have four employees (R. 18). In the fourth quarter of 1955, when the last policy was issued, the Central Distributing Company did not have four employees (R. 43, Plaintiffs' Exhibit C).

The insurance policy was delivered to Mr. Cadez on November 18, 1949, by Mr. Coe (R. 17). Mr. Cadez did not look at the policy because he presumed it was all right, since Mr. Coe had told him he was "fully covered" (R. 18). By the phrase "fully covered," Mr. Cadez thought he was covered for *any loss of any kind* (R. 17). From that day on, he never looked at his 1949 policy nor the 1952 or 1955 renewals (R. 18). Although Mr. Cadez saw Mr. Coe as often as three times a week (R. 19), there was never any discussion of specific coverages (R. 18). The phrase "Workmen's Compensation insurance" was never specifically mentioned (R. 16-17).

The "blanket liability" policy as issued in 1949, and as renewed in 1952 and 1955, granted additional coverage under an "employers liability" endorsement, but the endorsement specifically excluded coverage for "any obligations for which the insured may be held liable under any Work-

men's Compensation Law" (R. 15, Plaintiffs' Exhibit A; R. 45-6).

Workmen's Compensation coverage cannot be written as part of a "blanket liability" policy, but by Colorado law must be a separate policy (R. 26).

From 1954 through 1959, General did not write Workmen's Compensation insurance (R. 35, 34). In 1955, 13 of the 18 insurance companies, including General, that Mr. Coe was licensed to represent in Colorado, were authorized to write Workmen's Compensation insurance (R. 35, 36).

When the younger Cadez's took over their father's business in 1953, the father continued to handle the insurance (R. 21). Mr. Coe told the father that "everything was all right," but there was never any discussion of specific coverage nor in regard to liability on account of "employment of employees" (R. 21). The sons never examined the insurance policies with reference to coverage or protection because their "father was still there" (R. 21).

In June, 1958, an employee, Robert Hugueneé, was injured. He filed a Workmen's Compensation claim. General denied liability on the basis that the policy did not cover (R. 22). The petitioners were required to pay this claim. They subsequently began the present suit against General for reimbursement.

REASONS FOR DENYING THE PETITION

As previously pointed out, the respondents' position is that the petition for certiorari erroneously lists three questions which it is asserted show a breakdown of adjudicative processes. It has been necessary for the petitioners to place a strained construction on the evidence and lower court opinions to reach this result. Both the District Court and the Court of Appeals followed basic principles of agency law in holding that the insurance company was not liable for the negligent misrepresentations of its soliciting agent. These same basic principles have been followed by many

other courts, both Federal and State. There is definite unanimity of decisions in the various Courts of Appeal and the highest courts of the several states.[1]

I

The major premise upon which petitioners first rely is that the Court of Appeals has imputed a contract doctrine to a tort case. This major premise is false, and the entire syllogism based upon it must fall.

The doctrine of *Union Life Ins. Co. v. Burk*, 10th Cir., 169 F.2d 235, 239 cited by the Court of Appeals as controlling, is nothing but a simple explanation of basic agency law and of the equitable doctrine of estoppel. Neither facet of the quoted language is exclusively a contract doctrine. The laws of principal-agent certainly have application to the field of torts, as petitioners themselves admit when they cite the language of *Amco v. Black*, 10th Cir., 234 F.2d 12, 20, which sets forth the doctrine of apparent authority. The language of the *Union Life* case, that the representations "would not bind the company unless they were made within the scope of (the agent's) authority", necessarily encompasses in it the language of the *Amco* case, since the "scope of authority" is not limited to any particular type of authority but embraces express, implied and apparent authority.

The petitioners would apparently like to make the insurance company an "insurer" of every statement by every agent. However, this is not the law. The proof adduced at the trial clearly established that Coe, while representing General, was only a "local" or "soliciting" agent, as distinguished from a "general" agent (R. 30-34). As a "local" agent, his powers were strictly limited. He had no authority to proclaim he would give "full coverage" against any loss since he could not issue any policy (R. 33). He could not have issued Workmen's Compensation coverage with General, since General did *not* write such coverage in 1955 (R. 34.

[1] See Division II of the Argument, *supra*.

351). He had no authority to interpret the contract of insurance issued by General to say that it gave "full coverage."

II

Petitioners' second contention apparently is that the Courts below departed from acceptable standards of adjudication because they failed to hold that the insurance company had clothed Coe with "apparent authority" to give coverage and interpret it. Petitioners have failed to distinguish between "general" agents and "soliciting" agents and have compounded this error by "reasoning backward" to give the agent apparent authority which the insurance company never held him out as having. As was previously pointed out, a soliciting agent cannot issue any policy and has no apparent authority to say that he can. The insurance company holds him out as having authority to solicit, prepare and forward applications for insurance only.

This distinction between types of agents and the question of a principal's liability for an agent's misrepresentations outside the scope of authority have been universally tested. The view expressed by the Court of Appeals in the present action that there was no apparent authority vested in Coe is based on overwhelming precedent throughout the United States.[3] The cases which petitioners cite as being contrary (See Footnote 13 of Petition) are distinguishable, since in each case the agent had express authority to do

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[2] *See United Pacific Ins. Co. v. Northwestern National Ins. Co.*, 10th Cir., 185 F.2d 443, 447; *Union Life Ins. Co. v. Burk*, *supra*.

[3] A noted textwriter in the field has ably pointed out the problem and the solution. 16 Appleman, *Insurance Law and Practice*, Sec. 8631.

[4] Some of the better reasoned cases are: *Souter v. State Mutual Life Assurance Co.*, 4th Cir., 273 F.2d 921; *Jones v. Bankers Life Co.*, 4th Cir., 131 F.2d 989; *Cowan v. Travelers Ins. Co.*, 5th Cir., 131 F.2d 410; *Continental Casualty Co. v. Holmes*, 5th Cir., 266 F.2d 269; *Carra Vlad v. Equitable Fire and Marine*, 4th Cir., 261 F.2d 255; *Rodine v. Iowa Home Mutual*, 171 Neb. 263, 106 N.W.2d 391; *Holland v. Interstate Fire*, 229 Ark. 491, 316 S.W.2d 707; *Centennial Ins. Co. v. Parvell*, (Fla.), 83 So.2d 688.

the act alleged to be negligent. The question of the scope of authority was not an issue. Nor can the scope of authority of agents between the insurance company and third persons be fixed by a statute such as 72-1-25, Colo. Revised Statutes, 1953, as petitioners assert.[5]

III

According to the petitioners, the district judge violated their constitutional rights by applying the last paragraph of 72-1-25, Colo. Rev. Stat., 1953, to defeat their claim in tort. They base this contention on their interpretation of the language of *United American Life Ins. Co. v. Rebarchek*, 134 F. Supp. 554, 557, which actually does not support their contention, since the facts of that case clearly indicate that the insurance company was held liable, in spite of the statute, because the fraudulent act of the agent in preparing the application occurred while he was acting within the scope of his authority.

This is entirely different from the present situation. The application of 72-1-25, C.R.S. 1953, by the district judge was entirely proper. The statute merely codifies the basic principle of agency law that an insurance company is not liable for the acts of a soliciting agent unless the acts were commited within the scope of the agent's authority. Since a soliciting agent cannot make or interpret insurance contracts, Coe's statements in the present case were outside his authority. Thus, the district judge correctly applied the statute, irrespective of whether the action of the petitioners is based on tort or contract.

If the petitioners' interpretations were the law, an anomolous situation would arise. Every plaintiff would phrase his action in tort. There would no longer be any distinction between a "general" agent and a "soliciting" agent. Insurance companies could throw away their agency contracts. There would no longer be a distinction between

[5] *Mutual Life Ins. Co. v. Hilton-Green*, 241 U.S. 613; *Centennial Ins. Co. v. Parnell*, *supra*, Footnote 4.

"within the scope" and "outside the scope." Any agent could bind the company by his oral representations. The unscrupulous could always have a "jury question" by asserting that the agent had misrepresented, even though the agent denied it.

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari should be denied.

Respectfully submitted,

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